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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 181

CARL LIPPARD AND PAUL LIPPARD,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

JOHN M. ROBINSON,
G. T. CARSWELL,
Counsel for Petitioners.

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THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

To the Honorable the Supreme Court of the United States:

Your petitioners, Carl Lippard and Paul Lippard, pray the Court to review on writ of certiorari a decision of the Supreme Court of the State of North Carolina in the case of *State of North Carolina* v. *Carl Lippard and Paul Lippard,* rendered on the 19th day of May, 1943, which written opinion of that Court was filed on the same date.

Page references which are hereinafter made refer to the record as printed in the court below.

Part I. Summary and Short Statement of the Matters Involved.

Carl Lippard and Paul Lippard, petitioners, were indicted with others on the 22nd day of March, 1942, when a quantity

of Federal tax paid whiskey was found on a truck at the home of Carl Lippard. The whiskey was seized by the Rural Police of Mecklenburg County and turned over to the County Auditor, and the truck was taken possession of by Mecklenburg County and the whiskey was sold by Mecklenburg County to the Cumberland County ABC Stores in Fayetteville, North Carolina, for $4,850.00 (Record 39, testimony of L. Z. Hicks, who was assistant to the County Auditor, G. D. Bradshaw), and the truck was sold for $1,450.00 (R. 40), all of which money was received by the Treasurer of Mecklenburg County, North Carolina. Photostatic copy of the judgment is made a part of the record and filed with the record of petitioners, showing the sentences imposed by the presiding judge on April 13, 1942, against the petitioners upon their plea of guilty to the charge and/or charges in the warrants (it being a disputed question whether the defendants pled guilty to all the charges in the indictment or to one charge) (Court Clerk's testimony, R. 44, 45).

Again on June 22, 1942, the petitioners were indicted with others, charged with conspiracy to violate the liquor law of North Carolina as relates to Mecklenburg County (R. 2).

When the case was called for trial, the Solicitor made a judicial admission in the record (R. 8), which is as follows:

> "It is admitted by the State that all charges in this case against the defendants, Carl Lippard and Paul Lippard, took place before April 22, 1942."

The conspiracy charge covered the same period of time that the warrants covered on which the petitioners had been indicted and had been tried on April 13, 1942.

There is no contention being made by the State that the petitioners had violated the North Carolina liquor law as pertains to Mecklenburg County after their first trial on April 13, 1942, and that the conspiracy charge related to the

same period of time as a matter of law that the first warrants related to charging the petitioners with a violation of the North Carolina liquor law pertaining to Mecklenburg County, to which the petitioners pled guilty and were sentenced.

The petitioners made a motion to continue the case and for it not to be tried by the presiding judge on the ground that he had expressed an opinion in the press on June 24, 1942, and on June 25, 1942, subsequent to the indictments, which quoted the Court as expressing an opinion that the petitioners, Carl Lippard and Paul Lippard, were guilty or responsible for the offenses that they stood charged with others named in the indictment (R. 11, 12, 13, 14). Also the petitioners made a plea of former jeopardy, contending that the petitioners had been tried upon warrants charging them with violation of the North Carolina liquor law as pertains to Mecklenburg County, contending that if the evidence offered upon the charge of conspiracy had been offered at the first trial, it would have been sufficient to convict the petitioners. Both motions were denied. Exceptions were taken (R. 16, 46). Trial was had as shown by the record of the petitioners, resulting in their conviction and sentence to eighteen months and six months, respectively (R. 4, 5). All other defendants were acquitted by directed verdict or verdict of the jury, except James Correll, who was permitted to pay the costs at the rate of a small amount each month.

Appeal was taken by the petitioners to the Supreme Court of the State of North Carolina, where the judgment of the trial court was upheld (R. 186-191).

Part II. Jurisdictional Statement.

The jurisdiction of this Court is invoked under the due process clause of the Fourteenth Amendment to the Constitution of the United States that safeguards the funda-

mental principles of liberty and justice to citizens of the United States. The petitioners invoked that principle in their plea, as set out in the affidavit of Carl Lippard, adopted by Paul Lippard (R. 32), as follows: "The defendant pleads for an opportunity to have a fair and impartial trial as he contends every citizen has an inherent right to under the laws and constitution of his land."

> "The due process clause of the Fourteenth Amendment requires that action by a State through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions which not infrequently are designated as 'the law of the land'. Where this requirement has been disregarded in a criminal trial in a State court, this Court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee."
>
> *Louis Buchalter, Petitioner,* v. *People of the State of New York,* 87 U. S. Supreme Court Decisions, 1088.

Upon their plea of double jeopardy and their right of trial by jury, your petitioners contend that their rights to a fair and impartial trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States were violated, and further that it appears from an examination of the record that the entire record leaves the person who examines it with the opinion that the conduct of the trial was grossly unfair to the petitioners, in that:

> (1) they were tried for conspiracy to violate the prohibition law about which they had already pled guilty to a violation of the North Carolina liquor law (R. 17, 22);
>
> (2) that the Court had expressed an opinion prior to the trial in a daily newspaper with a large circulation that the petitioners were the real guilty parties in the indictment (R. 14);

(3) evidencing the effect of that statement, 50% of the 161 prospective jurors expressed the opinion that the petitioners were guilty from what they had read in THE CHARLOTTE NEWS, in which the trial Judge had expressed the opinion prior to the trial that the petitioners were guilty (R. 31, 32);

(4) denial by the Court of the petitioners' motion for bill of particulars (R. 7);

(5) denial of the petitioners' motion to continue the case and the presiding judge not to try the case (R. 16, 25, 28, 33);

(6) allowing the State to have private prosecution after eight of the jurors had been selected and agreed upon by the State and the petitioners and with the denial to counsel for the petitioners to examine the jury concerning their connection with any organization employing the private counsel who came into the case after the case had been in progress for several days (R. 26);

(7) imprisoning the State's chief witness until he had made a statement against the petitioners and himself and allowing his testimony to be offered over the objection of the petitioners, upon which testimony the petitioners were found guilty (R. 67, 68, 69).

When the State caused the prosecuting witness, L. W. Teter, to be placed in jail until he had made a statement and then released him after he had made a statement, and then some days before the case was called for trial rearrested him and kept him in custody until after he had testified, the provision of the Fourteenth Amendment, guaranteeing to every citizen that no State shall deprive him of his life, liberty or property without due process of law nor shall he be denied the equal protection of the law, was violated. While this witness was not indicted with the petitioners, his testimony was gotten under such circumstances that it should have been held incompetent and

excluded by the Court. The petitioners contend that there is greater danger of a confession being unworthy that has been forced out of a witness who has been wrongfully imprisoned and held secretly in prison without benefit of counsel or friends than of a confession from a defendant who has been wrongfully imprisoned and has been mistreated and forced to give evidence against himself.

Part III. Questions Presented.

1. Did the Supreme Court of North Carolina err in holding as a matter of law that there was no evidence to be submitted to the jury upon the question of the petitioners' plea of former jeopardy?

2. Did the Supreme Court of North Carolina err in holding as a matter of law that the petitioners had had a fair and impartial trial?

3. Did the Supreme Court of North Carolina err in holding that the testimony of L. W. Teter was competent in the light of the circumstances under which it was obtained?

4. Treating the record as a whole, did the Court err in holding that the trial judge did not err in not disqualifying himself by reason of his having expressed an opinion prior to the trial that the petitioners were guilty when it clearly appeared from the examination of the 161 prospective jurors that what he had put in the paper had influenced the majority of them to express the opinion that the petitioners were guilty?

WHEREFORE, because the decision and judgment of the Supreme Court of North Carolina, finding no error on the entire record in the petitioners' case, is violative of the due process clause of the Fourteenth Amendment to the Constitution which is referred to in the record of the petitioners as the fundamental law of the land, the petitioners pray that the writ of certiorari be issued to the end that

their cause may be reviewed and determined by the Supreme Court of the United States, and that upon such review that the judgment of the Supreme Court of North Carolina be reversed.

CARL LIPPARD,
PAUL LIPPARD,
Petitioners.
JOHN M. ROBINSON,
Counsel for Petitioners.
G. T. CARSWELL,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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No. 181

CARL LIPPARD AND PAUL LIPPARD,
Petitioners,

vs.

THE STATE OR NORTH CAROLINA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion of the Court Below.

The opinion of the Supreme Court of North Carolina in petitioners' case is reported in 223 N. C. 168.

II. Jurisdiction.

The jurisdiction of this Court is invoked under the Fourteenth Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any citizen of life, liberty, or property, without due process of law."

III. Statement of Case.

The petitioners have made in their petition, to which this brief is attached, a brief summary of the facts and will not make a re-statement here except as discussed in the brief.

IV. Argument.

1. Did the Supreme Court of North Carolina err in holding as a matter of law that there was no evidence to be submitted to the jury upon the question of the petitioners' plea of former jeopardy?

The petitioners were arrested and warrants sworn out on March 22, 1942, referred to in the record, charging them with violating the prohibition law of North Carolina; were tried April 13, 1942, to which charge and/or charges they pled guilty; were sentenced as appears in the record. On June 22, 1942, they were charged in an indictment with others with conspiracy to violate the North Carolina prohibition law which, by stipulation, covered the same period of time that the first warrants covered. According to the laws of North Carolina, in the first warrant the question of conspiracy could have been presented in the charges at the trial whether alleged or not.

State v. *Donnell*, 202 N. C. 782.

The facts which brought about the indictment in the first warrants against the petitioners and others grew out of the same matters at the same time, and, according to the rules of the North Carolina courts, the cases could have been consolidated upon motion of the Solicitor. *State* v. *Combs*, 200 N. C. 671.

United States v. *One Buick Coach Automobile*, 34 F. (2d) 318, holds:

> "It is undoubtedly the law that, if time is not of the essence of an offense (like selling liquor on Sunday or

a legal holiday), the offense may be proved at any time within the statute of limitations, and will usually operate as a bar to subsequent prosecution for this offense at any time prior to filing the information or indictment."

Under the law and the rules of the Court, the question of conspiracy to violate the prohibition law could have been presented in the first indictment of the petitioners on the warrants sworn out on the 22nd day of March, 1942.

We also cite the case of *Krench* v. *United States*, 42 F. (2d) 354, at page 356, where the Court, in passing upon defendant's plea of double jeopardy where he was indicted (1) for violating the Tariff Act of 1922 by bringing merchandise into the country; (2) with the concealment of merchandise after it had been brought in, in violation of the Act; and (3) with conspiracy to import and bring merchandise into the country in violation of the same Act, the Court held that the third count constituted former jeopardy, and, in disposing of the case, among other things, stated:

"The facts which the government was forced to rely upon in this case to prove the substantive offense charged in the first count also proved the offense charged in the third count, and in our opinion it was double punishment to pass sentence upon appellant on both counts."

2. Did the Supreme Court of North Carolina err in holding as a matter of law that the petitioners had had a fair and impartial trial?

The petitioners contend that they did not have a fair and impartial trial as guaranteed to them in the Fourteenth Amendment to the Constitution of the United States, and that the trial that they received was not consistent with the principles of liberty and justice as guaranteed to them in the said Amendment.

(1) The Court had expressed an opinion after they were indicted and put it in the public press that these petitioners were the guilty parties;

(2) That the same Judge whose statement was quoted in the press as expressing an opinion that these petitioners were guilty, over the protest of these petitioners, presided over the trial;

(3) That the petitioners' motion for a bill of particulars so that they would know how to prepare the plea of former jeopardy and their defense to the indictment was denied;

(4) The jury had to be chosen from several venires, all aggregating 211 men;

(5) That over 50% of 161 of them expressed the opinion, when they were questioned by counsel upon their fitness to serve as jurors to try the petitioners and others indicted with them, that the petitioners were guilty from what they had read in THE CHARLOTTE NEWS and other papers;

(6) That private counsel was permitted to come into the case, after the case had proceeded to trial for more than one day and after eight of the jurors had been chosen, to assist the Solicitor in prosecuting the case, the Court refusing counsel for the petitioners the right to further examine the eight jurors theretofore chosen;

(7) The imprisonment of the chief witness and holding him incommunicado until he had made a statement, then some days prior to the trial arresting him and registering him under an assumed name at a hotel and keeping him a prisoner until after he had testified.

Your petitioners contend that an examination of the record brings the examiner to the conclusion, with a solemn conviction, that they did not have a fair and impartial trial, the jurors who were chosen and before whom the case was

tried having heard one hundred jurors state in their presence that they had read the paper which contained the presiding Judge's statements that the petitioners were guilty, which amounted to the Judge having told the jury prior to the trial that your petitioners were guilty, and that they had formed and expressed an opinion that they were guilty. There is no surmise or question but that the prospective jurors who were questioned as to their fitness to serve on the jury had read the quoted statements by the presiding Judge that these petitioners were the really "big fish" and the persons responsible for the crime.

3. Did the Supreme Court of North Carolina err in holding that the testimony of L. W. Teter was competent in the light of the circumstances under which it was obtained?

The testimony of L. W. Teter was obtained by wrongful imprisonment in violation of his civil rights. "I couldn't get anybody. A policeman could come in, but they didn't" (R. 69). "They were asking me and they knew the answer. They asked me because they wanted to see what I was going to say, and if I sat there and did not answer, why they would tell me the answer. They picked me up at 2:30 in the morning and brought me down and locked me up and I tried to get bond and they said I could not get bond. They wouldn't give me bond at all. I don't know what they had me charged with. I didn't ask them to read it to me. He just brought the paper in there and four or five of them was in there and more come in. They kept me there all that night and the next day. I got away the next P. M. about seven o'clock. I was turned loose without any bond" (R. 67, 68).

Your petitioners not knowing who the witness for the State would be, the Court having denied the petitioners' motion for a bill of particulars, which motion asked for the names of the prosecuting witnesses, your petitioners ob-

jected to the questions when they were asked by the Solicitor, and it was only after the cross-examination was had that the petitioners ascertained how the statement was forced out of L. W. Teter.

Your petitioners allege that testimony gotten under the circumstances as it was gotten from L. W. Teter, the witness upon whose testimony petitioners were convicted and without which they could not have been convicted, was gotten in such flagrant violation of the civil rights of the witness and under such circumstances that the testimony should have been excluded.

The case of *McNabb, et als.* v. *United States of America,* reported in *87 U. S. Supreme Court Reports, 579,* dealt with a prisoner who was arrested in the Federal Courts, and it is not analogous to the facts and circumstances of the petitioners' case, but it lays down a principle that should obtain where testimony is gotten as in your petitioners' case. The reason your petitioners contend it should apply is that it is easier to secure testimony or extract statements out of a witness who is not indicted to testify against somebody else than it is to force confessions out of a defendant.

We think that this much of the opinion of the above cited case is pertinent:

> "We hold ony that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

While your petitioners recognize that the Federal guarantee in the Fourteenth Amendment does not include provi-

sions of the state constitutions or state laws, but where it appears, as your petitioners contend it does in this case, that actual bias on the part of the court or jury which tried the case, appears to have existed and has been established as in the record, as contended by petitioners, then our highest Court should grant the writ of your petitioners.

4. Treating the record as a whole, did the Court err in holding that the trial judge did not err in not disqualifying himself by reason of his having expressed an opinion prior to the trial that the petitioners were guilty when it clearly appeared from the examination of the 211 prospective jurors that what he had put in the paper had influenced the majority of them to express the opinion that the petitioners were guilty?

This question has been partially dealt with in our brief heretofore. Your petitioners contend that for a judge prior to the trial to express himself through a daily paper to the effect that your petitioners are guilty and then later on to preside over the trial and the attending circumstances with reference to the selecting of the jury that followed, which have heretofore been recited, all indicate clearly extreme bias and prejudice, which denied to your petitioners a right to a fair and impartial trial as guaranteed to them in the fundamental law of the land and which Mr. Justice Roberts, in a very recent opinion, decided on June 1, 1943, in the case of *Buchalter* v. *People of the State of New York, 87 U. S. Supreme Court Reports, 1088.*

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'. Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to

exercise its jurisdiction to enforce the constitutional guarantee."

Conclusion.

For the reasons set forth in the petition for writ of certiorari and in this brief, and in order that your petitioners may not be deprived of their liberty by a trial that was saturated with bias and prejudice, it is respectfully submitted that this Court should exercise its jurisdiction to preserve to your petitioners their constitutional guarantee by correcting the erroneous decision of the Supreme Court of the State of North Carolina; that a writ of certiorari should be granted; and that thereafter your petitioners' case should be set down for hearing and judgments and decisions of the North Carolina Supreme Court and of the trial court reversed.

Respectfully submitted,

JOHN M. ROBINSON,
G. T. CARSWELL,
Counsel for Petitioners.

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AUTHORITIES CITED

IN THE

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OCTOBER TERM, 1943

No. 181

CARL LIPPARD AND PAUL LIPPARD,

Petitioners,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners, Carl Lippard and Paul Lippard, seek by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Mecklenburg County imposing sentence upon the petitioners for conspiracy to violate the laws of North Carolina, relating to the possession, transportation, and sale of intoxicating liquors. The opinion of the Supreme Court of North Carolina was filed May 19, 1943, and is reported as *STATE v. CARL LIPPARD AND PAUL LIPPARD*, 223 N. C. 167.

FACTS

The petitioners, Carl Lippard and Paul Lippard, were indicted at the June 22, 1942, term of Mecklenburg County Superior Court, together with certain other defendants, upon a charge that they did "unlawfully and wilfully conspire, confederate and agree together to buy, possess, possess for the purpose of sale, transport and sell intoxicating liquor." (R. 2). Although the indictment also charged consummation of the conspiracy, the case was submitted to the jury solely as a prosecution for conspiracy (R. 110-128) and was so regarded in the Supreme Court of North Carolina (R. 186). Both petitioners were found guilty (R. 4).

The petitioners interposed pleas of former jeopardy. Evidence was offered that Carl Lippard and Paul Lippard had previously been tried on separate warrants charging each of them separately with actual violation of the prohibition laws (R. 33-34). The petitioners pleaded guilty to these former charges (R. 36 and 43). The presiding judge held that the pleas of former jeopardy were not good as a matter of law (R. 46).

Upon conviction of the charge of conspiracy, the petitioners appealed to the Supreme Court of North Carolina assigning as error the denial of their pleas of former jeopardy, the overruling of their motion for a bill of particulars, the refusal of the court to declare a mistrial and allow a continuance, and certain rulings upon the admissibility of evidence. The Supreme Court of North Carolina affirmed their conviction.

ARGUMENT

I

THE DENIAL OF PETITIONERS' PLEAS OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The United States Supreme Court has never decided that the Constitution of the United States protects an individual against "double jeopardy" or successive prosecutions for the same offense in a state court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

Barron v. Baltimore, 7 Pet. 243;
United States v. Lanza, 260 U. S. 377.

This court has intentionally refrained from deciding whether the guarantee of due process afforded by the Fourteenth Amendment protects an individual against successive prosecutions for the same crime in a State court.

Dreyer v. Illinois, 187 U. S. 71, 85;
Keerl v. Montana, 213 U. S. 135, 138;
Shelvin-Carpenter Co. v. Minnesota, 218 U. S. 57, 67.

Assuming, however, that the Fourteenth Amendment protects an individual against double jeopardy in a State court, no substantial federal question is presented by this petition, for, under the decisions of this Court, it clearly appears that the petitioners have not been placed in jeopardy twice for the same offense.

The petitioners pleaded guilty on April 15, 1942, (R. 35 and 36) to warrants charging each of them separately with the manufacture, purchase, possession, possession for pur-

pose of sale, sale, and transportation of intoxicating liquors (R. 33 and 34). They were separately charged with actual violations of the laws relating to intoxicating liquors, no joint action of any kind or agreement between them being alleged. The subsequent prosecution, out of which this petition arises, charged a conspiracy of the petitioners and others to violate the laws of North Carolina relating to intoxicating liquors (R. 2). In determining the sufficiency of the plea of former jeopardy, the Supreme Court of North Carolina, following well established local precedents, held that successive prosecutions, even though growing out of the same transaction, do not result in double jeopardy unless the offenses charged are the same in law and in fact. The court concluded that the plea of former jeopardy was bad as a matter of law because a conspiracy and actual violation of the laws relating to intoxicating liquors are different offenses.

The Supreme Court of the United States, like the Supreme Court of North Carolina, has made identity of the offenses charged the test of whether a second prosecution results in double jeopardy.

> *Burton v. United State*, 202 U. S. 344;
> *Gavieres v. United States*, 220 U. S. 338;
> *Ebeling v. Morgan*, 237 U. S. 625;
> *Morgan v. Devine*, 237 U. S. 632;
> *Blockburger v. United States*, 284 U. S. 299.

None of the elements of a conspiracy to commit a crime and of the consummated offenses are the same. The essential element of a conspiracy is an agreement to do an unlawful act. It is immaterial whether the act is actually carried out. On the other hand, in a prosecution for the consummated offense, it is immaterial whether two or more persons conspired to commit it. Although the same facts and circumstances may reveal both a conspiracy and a consummated crime, the proof required for each is different.

Considerations such as those stated above have prompted the United States Supreme Court, like the Supreme Court

of North Carolina, to hold that a conspiracy and the consummated crime are separate and distinct offenses.

United States v. Rabinovich, 238 U. S. 78;
Heike v. United States, 227 U. S. 131.

Furthermore, this Court has held the prohibition against double jeopardy in the Fifth Amendment is not violated by separate punishments for a conspiracy and the consummated offense.

Carter v. McClaughry, 183 U. S. 365.

As Justice Holmes observed in *Heike v. United States*, 227 U. S. 131, 144:

> "At all events, the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims."

Convictions in the lower federal courts for both conspiracies and the consummated offenses have been frequent. Separate punishments have not been found repugnant to the Fifth Amendment.

Freeman v. United States, 244 Fed. 1 (C. C. A. 7th) *Certiorari Denied* 245 U. S. 654;
Bens v. United States, 266 Fed. 152 (C. C. A. 2d);
Moorehead v. United States, 270 Fed. 210 (C.C.A. 5th) *petition dismissed* 257 U. S. 643;
United States v. Panilla, 299 Fed. 714 (C. C. A. 3d);
Vlassis v. United States, 3 F. (2d) 905 (C. C. A. 9th);
Chew v. United States, 9 F. (2d) 348 (C. C. A. 8th);
Hilt v. United States, 12 F. (2d) 504 (C. C. A. 5th);
Mitchell v. United States, 23 F. (2d) 260 (C. C. A. 9th) *Certiorari Denied*, 277 U. S. 594;
Curtis v. United States, 67 F. (2d) 943 (C. C. A. 10th).

In the face of overwhelming authority to the effect that separate prosecutions for a conspiracy and for the consummated offense do not constitute double jeopardy, the denial of the petitioners' pleas of former jeopardy does not present a federal question of sufficient importance to warrant the allowance of the petition.

II

THE ARGUMENT THAT THE PETITIONERS DID NOT HAVE A FAIR AND IMPARTIAL TRIAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTIONS.

Under Question No. 2, the petitioners contend that the proceedings in the State Court were violative of the due process clause of the Fourteenth Amendment in that the petitioners were denied a fair and impartial trial. In connection with this argument, it is contended that the evidence of a certain witness should not have been admitted and that the trial judge was disqualified by reason of bias. These matters are discussed under Questions Nos. 3 and 4 of the Petitioners' brief and will be discussed under Parts III and IV of this brief.

Disregarding, for the moment, the contentions mentioned above, which will be discussed elsewhere, the argument of the petitioners is based principally upon two alleged violations of the Fourteenth Amendment: (1) The failure to grant a bill of particulars to petitioners, and (2) the failure to secure an impartial jury.

The petitioners do not now, nor have they at any stage of the proceedings, questioned the legal or constitutional sufficiency of the bill of indictment. By the indictment (R. 2), they were clearly put on notice that the offense charged was a conspiracy to violate the laws of North Carolina relating to intoxicating liquors. This Court has held that the sufficiency of a bill of indictment in a state court is not a federal question.

Caldwell v. Texas, 137 U. S. 692;

Davis v. Texas, 139 U. S. 651;
Re Robertson, 156 U. S. 183;
Moore v. Missouri, 159 U. S. 673;
Howard v. North Carolina, 191 U. S. 126;
Barrington v. Missouri, 205 U. S. 483.

A fortiori, the question whether a bill of particulars should be granted is not a federal question.

The argument that the petitioners were denied an impartial jury is not based upon the enumeration of specific grounds for the disqualification of any individual jurors who tried the case. It is suggested, however, that a newspaper account of the trial judge's remark before the trial of this case that the case would not be called "unless the big fellows are brought in" (R. 11) prejudiced the jury. Yet it does not appear from the record that this remark was made in the presence of any of the jurors or that a single juror had read or heard of the newspaper article. The large number of prospective jurors examined and excused is indicative of painstaking efforts to secure an impartial jury rather than of a disregard of the constitutional rights of the petitioners. Although the petitioners assert that they should have been permitted to examine the jurors further after the association of private counsel with the public prosecutor, the record is devoid of any suggestion as to what inquiries would have been made in addition to those made by the court on its own motion (R. 27). The North Carolina Supreme Court relied upon the absence of any indication in the record of the interrogatories which the petitioners wishes to propound (R. 190) in affirming the conviction.

None of these matters in connection with the selection of the jury raises any questions except questions of state law. None of them is of sufficient seriousness to warrant a conclusion that the constitutional rights of the petitioners were violated. The selection of the jury and the ruling of the court upon challenges do not ordinarily present federal questions.

Hayes v. Missouri, 120 U. S. 68;

Spies v. Illinois, 123 U. S. 131;
Barrington v. Missouri, 205 U. S. 483;
Buchalter v. New York, 87 L. ed Adv. Ops. 1088.

III

THE COMPETENCY OF THE TESTIMONY OF L. W. TEETER IS NOT A FEDERAL QUESTION.

Ordinarily, objections to the competency or relevancy of testimony in a state court do not present a federal question.

Brooks v. Missouri, 124 U. S. 394;
Sherman v. Grinnell, 144 U. S. 198;
Barrington v. Missouri, 205 U. S. 483;
Buchalter v. New York, 87 L. ed Adv. Ops. 1088.

However, where it has appeared that confessions have been obtained from a defendant by compulsion and in flagrant disregard of constitutional rights, this Court has sometimes assumed jurisdiction to determine whether the admission of confessions in a state court violated the Fourteenth Amendment.

Chambers v. Florida, 309 U. S. 227.

The admission of the testimony of the State's witness, L. W. Teeter, of which petitioners complain, presents no question comparable to those considered of sufficient seriousness to require review by this Court in cases such as *Chambers v. Florida*. Although the petitioners complain of alleged improper influences while the witness was being examined by officers prior to the trial, their objection is not to the admission of any statement elicited from him, but to the competency of the testimony given in open court by the witness in person. The answer of the North Carolina Supreme Court to objections to this testimony seems sufficient:

> "Testimony to the effect that the witness hauled liquor from Baltimore to Charlotte for the defendants was given by the witness himself, from the witness stand in the due course of the trial, and it cannot be assumed that such testimony was induced by hope or extorted by fear. It would rather be assumed, since there is an absence of the contrary appearing, that the judge would have protected the witness from any abuse." (R. 190).

The case of *McNabb v. United States,* 87 L. ed Adv. Ops. 579, upon which petitioners rely, is not in point, for it is concerned with a prosecution in the federal courts, and the decision rests upon statutory rather than constitutional grounds.

IV

THE ALLEGED EXPRESSION OF OPINION BY THE TRIAL JUDGE IS NOT SUFFICIENT TO RAISE A QUESTION OF HIS DISQUALIFICATION UNDER THE FOURTEENTH AMENDMENT.

There can be no doubt that the Fourteenth Amendment guarantees to a person accused of crime the right to be tried before an impartial judge.

Tumey v. Ohio, 273 U. S. 510.

The facts upon which the petitioners rely, however, are wholly insufficient to raise a question as to the disqualification of the trial judge under the Fourteenth Amendment. The record contains no suggestion that the trial judge had any interest, personal or pecuniary, in the outcome of the trial. There was no evidence that the judge was prejudiced by personal animosity toward the petitioners. Although the petitioners compain of alleged errors of law, the record does not disclose, and apparently the petitioners do not contend, that

the presiding judge was guilty of any misconduct in the actual trial of the case or that he failed to conduct himself with strict judicial impartiality.

The only fact upon which the petitioners rely is that, prior to the trial of the case, the judge had refused to proceed against other defendants indicted jointly with the petitioners until the petitioners could be apprehended, and that he had remarked that he would not feel right about trying the little fellows until the big fellows were brought in. From the affidavits of the petitioners (R. 11-16), it appears that these remarks were made by the judge in discussing with counsel the time at which the case should be called. Although they were published against the wishes of the judge (R. 13 and 16), they were not made during the trial, and there is no evidence that any of the jurors who tried the case heard of them. Remarks of this character made prior to the trial of a case are not sufficient to raise a federal question as to the disqualification of the judge.

V

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONERS FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the petition for writ of *certiorari* are not federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the petition, for the petitioners failed to set up any of these questions *as questions arising under the Constitution of the United States* in the State courts.

Careful examination of the record will show that, although the petitioners took numerous exceptions to alleged errors of

law, they failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (R. 186) treats the exceptions taken by the petitioners as raising questions of State law only. No federal questions are mentioned. The petition for writ of *certiorari* filed in this Court omits any allegation that federal questions were set up as such in the State courts.

Under the statute authorizing review by *certiorari* of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U. S. C. 1940 ed., Sec. 344.

The rights, privileges, or immunities must be set up in the state courts.

Hartford Life Ins. Co. v. Johnson, 249 U. S. 490.

CONCLUSION

The questions set out in the petition are not federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

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